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In the

Supreme Court of the United States

No. 372

HORACE HART,

Petitioner,

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE NATURE OF THE CASE AND RESULT BELOW

This is a workmen's compensation case in which Petitioner alleged in his claim filed before the Texas Industrial Accident Board that he sustained a general accident injury while employed by Wesco Materials Corporation in Dallas County, Texas, November 28, 1959. His claim would have supported a recovery before the Board of $14,035.00.

The Board entered an award of $910.00 and Respondent duly filed suit in the United States District Court, Northern District of Texas, Dallas Division, seeking to be relieved of a claim, the maximum value of which was $14,035.00.

Jurisdiction of the Federal Court was based upon the diversity statute (28 U. S. C. A., Sec. 1332).

After suit was brought, Petitioner moved to dismiss for want of jurisdiction and filed a counter claim for $6310.00.

Although Petitioner claimed in his pleadings in the United States District Court that less than $10,000.00 was involved and, therefore, the Court was without jurisdiction, he waived all claims to the jurisdiction and demanded a trial. As a result of the trial to a jury, he was awarded $1224.00. Petitioner seeks a review of the judgment he obtained with which he now claims to be dissatisfied.

RESPONDENT'S COUNTERPOINTS

FIRST COUNTERPOINT

The appeal in this case has not been properly perfected to the Court of Appeals and this Honorable Court lacks jurisdiction to grant a Writ of Certiorari.

SECOND COUNTERPOINT

This is not a proper case for the granting of a Writ of Certiorari prior to a judgment by the Court of Appeals.

THIRD COUNTERPOINT

Federal jurisdiction exists in this case because the amount in controversy is properly governed by the allegations of the Respondent's complaint rather than by Petitioner's counterclaim.

FIRST COUNTERPOINT—(Restated)

The appeal in this case has not been properly perfected to the Court of Appeals and this Honorable Court lacks jurisdiction to grant a Writ of Certiorari.

STATEMENT UNDER FIRST COUNTERPOINT

After a jury verdict, a judgment based thereon was entered by the trial court June 16, 1961 (Tr. pp. 181-182). Petitioner filed a motion for new trial June 23, 1961 (App. A infra). On July 14, 1961, Petitioner filed his application to *withdraw* his motion for new trial (App. B infra). While the motion for new trial was still pending, Petitioner filed his first notice of appeal July 14, 1961 (App. C infra). Order was entered by the trial court on the 19th day of July, 1961, *withdrawing* the motion for new trial (App. D infra). On July 24, 1961, Petitioner attempted to file a second notice of appeal (App. E infra).

ARGUMENT AND AUTHORITIES UNDER FIRST COUNTERPOINT

At page 2 of the Petition for Writ of Certiorari it is stated: "Appeal was duly perfected to the Court of Appeals". Respectfully, this is believed to be erroneous. By the terms of Rule 73(a) of the Federal Rules of Civil Procedure, Petitioner was required to file his notice of appeal within thirty days from the date of entry of the judgment. It is true that he attempted to file a notice of appeal on the 14th day of July, 1961, twenty-eight days after the entry of the judgment on June 16, 1961, but at that time his motion for new trial was

pending. It has been held in an unbroken line of cases by this Honorable Court and the Circuit Courts of Appeal that a notice of appeal filed while a motion for new trial is pending is premature and nugatory. See *Napier v. Delaware, Lackawanna and Western R. Co., 223 F. 2d 28; Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 14 S. Ct. 4, 37 L. Ed. 986; Zimmern v. United States, 298 U. S. 167, 56 S. Ct. 706, 80 L. Ed. 1118; Leishman v. Associated Wholesale Electric Co., 318 U. S. 203, 63 S. Ct. 543, 87 L. Ed. 714; Bowman v. Loperena, 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177.*

The attempted notice of appeal filed July 14, 1961 by Petitioner was, therefore, a nullity.

Subsequently, the Court acted upon the application to withdraw the motion for new trial, and on July 19, 1961, entered an order decreeing its withdrawal.

Thus, on July 19, 1961, the case stood as though no notice of appeal had been given and no motion for new trial had been filed.

Rule 73(a) of the Federal Rules of Civil Procedure provides in part:

> "The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: Granting or denying a motion for judgment under Rule 50-(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact whether or not an authorization of the judgment would be required

> if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; *or denying a motion for a new trial under Rule 59*". (Emphasis added.)

Nothing in this rule authorizes extension of the time for appeal where the motion for new trial is *withdrawn* and the court enters an order not denying the motion but *withdrawing* it.

Generally, where a petition for rehearing, motion for new trial, or motion to vacate, amend or modify the judgment is seasonably made and *entertained*, the time for appeal does not begin to run until the disposition of the motion. See, *Leishman v. Associated Wholesale Electric Co., 318 U. S. 203; 87 L. Ed. 714* and cases cited under footnote 3, *87 L. Ed. 716.*

In *United States v. Ellicott, 223 U. S. 524; 56 L. Ed. 535 at p. 542* it is said:

> "The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees is, we think, applicable to judgment or decrees of the court of claims, and that rule treats a judgment or decree properly entered in the cause as not final for the purpose of appeal until a motion for a new trial or a petition for rehearing, as the case may be, *when entertained by the court*, has been disposed of; and the time for appeal begins to run from the date of such disposition. Kingman & Co. v. Western Mfg. Co., 170 U. S. 675, 680, 681, 42 L. Ed. 1192, 1194, 18 Sup. Ct. Rep. 786."

Denholm & McKay v. Commissioner of Internal Revenue, 132 F. 2d 243, by the First Circuit Court of Appeals was a case in which the United States Board of Tax Appeals had

ruled that taxpayer, Denholm & McKay Co., was entitled to a refund of taxes previously paid. After a period of thirty days within which, by the rules of the Board, a petition for rehearing might be filed but before the expiration of the statutory period of three months permitted for the filing of a petition for review in the Circuit Court of Appeals, the Commissioner of Internal Revenue filed before the Board a motion for reconsideration. Long after the expiration of the three-month period, the Board set aside its decision for the taxpayer and the taxpayer appealed. The Circuit Court recognized the rule that if a petition for rehearing is seasonably presented and "entertained", the time for taking an appeal may be extended. The Circuit Court held that since the Board had taken no action on the petition to reconsider its previous award until more than three months after the date of its original decision, the original decision had become final and the attempt of the Board to set it aside was beyond its jurisdiction. The Circuit Court had the following to say at page 247 of its opinion about the meaning of "entertainment":

> "What is meant by 'entertainment' of the petition for rehearing has not been entirely clear, as we had occassion to observe in Ortiz v. Public Service Commission, 1 Cir., 1940, 108 F. 2d 815, 817. Apparently it means merely that the court considers *on the merits* the grounds urged in the petition for rehearing. See Texas Pacific Ry. Co. v. Murphy, supra, 111 U. S. at page 489, 4 S. Ct. 497, 28 L. Ed. 492; United States v. Seminole Nation, supra; Bowman v. Lopereno, 1940, 311 U. S. 262, 266, 61 S. Ct. 20[illegible], 85 L. Ed. 177; Payne v. Garth, 8

> Cir., 1922, 285 F. 301, 309. When the published rules of the court permit the filing of a petition for rehearing within a stated period, that means that the court will ordinarily consider such petition on its merits, i.e., entertain it."

After which, in a footnote, the Court had this to say:

> "Perhaps, if such a petition, though filed within the time allowed, were ordered struck from the files, or denied, on the ground that it contained scandalous or contemptuous matter, without consideration of the merits, the petition would be deemed not to have been 'entertained' by the court; so that the time for taking an appeal would run from the date of the entry of the judgment."

Petitioner's motion for new trial was not "entertained" but was completely *withdrawn*. Therefore, the time for taking an appeal in the case at bar ran from the date of the entry of the judgment.

Petitioner's attempted second notice of appeal filed July 24, 1961 was filed more than thirty days after the final judgment was entered. Therefore, the appeal was not "duly perfected" as claimed by Petitioner on page 2 of his petition for Writ of Certiorari.

At page 2 of the application for Writ of Certiorari, Petitioner says his appeal was "docketed (in the Court of Appeals) therein on August 24, 1961 (Tr. pp. i, 193, 197.)" If it could be considered that by withdrawing the motion for new trial, the rule (as announced in the many cases above cited) that the filing of a notice of appeal during the pen-

dency of a motion for new trial is premature and nugatory may be ignored, and the notice of appeal filed July 14, 1961 was thereby revived, still the case on appeal to the Court of Appeals was not docketed within forty days from July 14, 1961, the date of the attempted first notice of appeal, as required by Rule 73(g) of the Federal Rules of Civil Procedure. It was not filed in that Court until the forty-first day following July 14, 1961. Failure to file the record within forty days after notice of appeal, without valid excuse, has been held to justify dismissal. See *U. S. v. Stanton, 172 F. 2d 642; U. S. v. Consolidated Freighiways, 178 F. 2d 756; U. S. v. Krause, et al., 197 F. 2d 329; U. S. v. Frijisaki, 198 F. 2d 747;* and *U. S. v. Lathrop, 199 F. 2d 954.*

For the want of notice of appeal within the thirty day period required by *Rule 73(a) of the Federal Rules of Civil Procedure*, the Court of Appeals for the Fifth Circuit does not have jurisdiction of this case; and in such a situation, the application for Writ of Certiorari to this Court should be denied. See, *Good Shot v. U. S., 1900, 21 S. Ct. 33, 179 U. S. 87, 45 L. Ed. 101.* See also, *King Iron Bridge & Manufacturing Co. v. Otoe County, Neb. 1887, 120 U. S. 225, 30 L. Ed. 623.* Jurisdiction of the lower appellate court is a necessity. It is lacking in the case at bar. Therefore, jurisdiction in this Honorable Court to entertain the petition for Writ of Certiorari is respectfully believed to be non-existent. See, *Mansfield, etc. R. Co. v. Swan, 111 U. S. 379, 28 L. Ed. 462; Cameron v. Hodges, 127 U. S. 322, 32 L. Ed. 132; Parker v. Ormsby, 141 U. S. 81, 35 L. Ed. 654.*

SECOND COUNTERPOINT—(Restated)

This is not a proper case for the granting of a Writ of Certiorari prior to a judgment by the Court of Appeals.

ARGUMENT AND AUTHORITIES UNDER SECOND COUNTERPOINT

This Honorable Court should refuse to grant the Writ of Certiorari of Petitioner, Hart, before judgment by the Court of Appeals because:

(a) The question presented therein is not of sufficient public importance.

Supreme Court Rule 20 provides:

> "A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

In *Forsyth v. Hammon, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095*, the Court set forth the rules which would govern granting of a Writ of Certiorari prior to a final decision by the Circuit Court in the following words:

> "* * * it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question considered, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the Courts of a state, or some matter affecting the interest of this nation in its internal or external relations demands such exercise."

The Court has consistently followed these rules and the cases in which certiorari has been granted prior to a decision by the Court of Appeals have been rare and have clearly presented matters of vital concern to the entire nation or a large proportion of its population. Comparison between such cases and the dispute in this case reveals that this case is not the kind to which this Court has formerly extended this unusual writ. The Petitioner generously estimates that the question will affect "literally hundreds of workmen's compensation cases" but the facts do not substantiate this.[1]

The following illustrate the type of questions to which this Court has previously limited this form of writ:

Ex Parte Quirin, 317 U. S. 1, 87 L. Ed. 3, involved the power of the President of the U. S., in time of war, to proclaim that enemy agents be tried by military tribunals rather than the courts.

U. S. v. United Mine Workers of America, 330 U. S. 258, 91 L. Ed. 884, presented the question of whether or not the Norris-LaGuardia Act prohibited the Government from obtaining a temporary restraining order against John L. Lewis and the United Mine Workers to prevent a nation-wide strike.

H. P. Hood and Sons v. U. S., 307 U. S. 588, 83 L. Ed. 1478, considered the constitutionality of the Agricultural

[1]Petitioner's own statistics show that only twenty-five direct suits in the whole State of Texas in workmen's compensation cases were brought to the federal courts by insurance companies in the year 1957 (see App. G, page 25-a, of appendices attached to Petitioner's Petition for Writ of Certiorari); and since July 25 of 1958, when removals in workmen's compensation cases in Texas were prohibited, only 11 of such cases have been filed up to and including August 31, 1961, in the Dallas Division for the Northern District of Texas. Eleven workmen's compensation cases were taken to this same division of the court during the same period by employees (see certificate of Reo Knowles, App. G, infra).

Marketing Agreement Act of 1937 and the Writ of Certiorari was granted "because important questions of Federal Law undecided by this Court were involved and pending appeals in other cases with similar issues were ready for argument." (Opinion p. 1483.)

U. S. v. The Three Friends, 166 U. S. 1, 41 L. Ed. 897, presented an admiralty question decided on Writ of Certiorari; "not merely for the guidance of the Executive Department of the Government, but also to disclose to each citizen the limits which he might not go beyond in interfering in the affairs of another nation without violating the laws of this." Statement in *Forsyth v. Hammon,* supra, at page 515.

Mr. Justice Frankfurter, in commenting on the testimony of the Chief Justice of the Supreme Court against pending legislation designed to route certain cases directly from the District Court to the Supreme Court, listed one of the primary reasons mitigating against the reviewing of a case by the Supreme Court prior to decision by the Circuit Court as follows:

> "Probably, also, it (the Supreme Court) regarded the illumination which serious questions should derive from passing through a Circuit Court of Appeals as valuable to the perspective and thoroughness of the Court's own deliberative process." Frankfurter & Fisher, The Business of the Supreme Court at the October Term 1935 & 1936, 51 Harv. L. Rev. 577, 616, n. 69."

(b) Petitioner voluntarily waived his plea to the jurisdiction of the trial court (see judgment of the trial court, App. A, pp. 1a-3a Petitioner's Petition for Writ of Certiorari).

(c) Petitioner voluntarily withdrew from consideration by the trial court his motion for new trial in which he claimed the trial court lacked jurisdiction to try the case (see App. A, B and D infra).

(d) Petitioner failed to file his notice of appeal within the proper time. His first notice of appeal, filed July 14, 1961 (App. C infra), was filed while his motion for new trial was pending and was, therefore, premature and nugatory as hereinabove shown. His second notice of appeal, filed July 24, 1961 (App. E infra), was not filed within thirty days from entry of the judgment June 16, 1961, as required by Rule 73(a) of the Rules of Civil Procedure as hereinabove shown.

> "The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the appeal there docketed within 40 days from the date of filing the notice of appeal."

(e) Petitioner failed to file the record within forty days after he filed, on July 14, 1961, his first notice of appeal (App. C infra), as required by Rule 73(g) of the Federal Rules of Civil Procedure; and, if he has any excuse, such excuse should be given to that Court (see Petitioner's statement under the heading "Jurisdiction" p. 2 his Petition for Writ of Certiorari in which he states "Appeal was * * * docketed therein [Court of Appeals] on August 24, 1961 [Tr. pp. i, 193, 197]). Pertinent portions of Rule 73(g) provide:

It is thus demonstrable that (1) the case really does not merit in importance resort to the sparingly-used procedure of granting Writ of Certiorari before the Court of Appeals has

rendered judgment; (2) Petitioner's own conduct in studiously withholding any challenge to the jurisdiction from proper consideration by the trial court does not deserve to be thus rewarded; and (3) Petitioner's failures to properly perfect the appeal to the Court of Appeals are matters which logically call for consideration and decision first by that Court.

THIRD COUNTERPOINT—(Restated)

Federal jurisdiction exists in this case because the amount in controversy is properly governed by the allegations of the Respondent's complaint rather than by Petitioner's counterclaim.

STATEMENT UNDER THIRD COUNTERPOINT

In its complaint filed in the Federal District Court, Respondent alleged that Petitioner's claim before the Texas Board recited:

> "I was operating maintainer blading roads and a piece of cable wrapped around the blade of the maintainer. I dismounted from the cab and caught hold of the piece of cable to jerk it off the blade and felt a severe pain in my back between the 4th and 5th vertibrae."

and that his average weekly wage was $90. Respondent further alleged in its complaint that more than $10,000, exclusive of interest and costs, was the amount in controversy (Tr. pp. 2-4). As shown by the judgment, Petitioner waived his plea to the jurisdiction of the Court (Tr. pp. 181-182). Petitioner voluntarily withdrew his challenge to the jurisdiction of the court, which he again asserted in his motion for new trial, when he voluntarily had the motion withdrawn (App.'s A, B and D infra).

ARGUMENT AND AUTHORITIES UNDER THIRD COUNTERPOINT

Under *Article 8306, Sec. 10* (App. F infra) and in view of the claim he filed with the Board, Petitioner had a right to claim, and Respondent was exposed to, a potential loss of $14,035. *Booth v. Texas Employers, 123 S. W. 2d 322 (opinion adopted by the Supreme Court of Texas).* In the complaint which Respondent filed in the Federal District Court, it sought to be relieved of this potential loss of $14,035.

This Court in *Horton v. Liberty Mut. Ins. Co., 6 L. Ed. 2d 890, 894,* said:

> "The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.' In deciding this question of good faith we have said that it 'must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal'."

In the *Horton* case, this Court went on to say that there was *no* showing "* * * let alone a showing 'to a legal certainty' of any lack of good faith on the part of the respondent in alleging that a $14,035 claim is in controversy." *Horton v. Liberty Mutual,* supra, at page 894. This rule that the amount in controversy is to be determined from the complaint and the good faith thereof, is based on *St. Paul Merc. Indemnity Co. v. Red Cab Co., 303 U. S. 283, 82 L. Ed. 845, 58 S. Ct. 586; Bell v. Preferred Life Assur. Society, 320 U. S. 238, 88 L. Ed. 15, 64 S. Ct. 5;* and *Aetna Casualty & Sur. Co. v. Flowers, 330 U. S. 464, 91 L. Ed. 1024, 67 S. Ct. 798,* and the many cases cited therein.

Despite the plain language in the *Horton* case adopting the rule established in the *Red Cab* and *Bell* cases, Petitioner misinterprets the *Horton* case and at page 8 of his Petition for Writ of Certiorari states:

> "This Court in Horton v. Liberty Mutual Ins. Co., 367 U. S. 348, permitted a plaintiff to affix jurisdiction by correctly prophesying what the defendant would seek under his counterclaim. In effect, the naked allegation of jurisdictional amount *suspends* the determination of federal jurisdiction until the defendant affirmatively reveals the amount he seeks under his counterclaim. The *Horton* case goes no further."

Based upon this misconstruction of the *Horton* case, the Petitioner concludes regarding the case at bar:

> "The foible of tentatively predicating jurisdictional amount on a conjectural sum that the defendant may claim is well illustrated here."

In this manner, the Petitioner creates the very evil he thereafter assails. This Court has not before placed its jurisdiction at the whim and caprice of the defendant in a federal court, and it plainly did not do so in *Horton*. Such maneuvers have been attempted in other cases of various types. Two of such attempts were dealt with in the *Red Cab* case. Regarding the reduction of his claim by a state court, plaintiff, after removal to the Federal Court by the state court defendant, in an effort to defeat federal jurisdiction, this Court said in *Red Cab*, supra, at page 294, U. S.:

> "We think this well established rule is supported by ample reason. If the plaintiff could, no matter how bona fide his original claim in the state court, reduce the amount of his demand to defeat Federal jurisdiction the defendant's supposed statutory right of removal would

be subject to the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election. If he does not desire to try his case in the Federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.

"This view is further supported by the authorities as to causes in which jurisdiction depends on diversity of citizenship. It uniformly has been held that in a suit properly begun in the Federal court the change of citizenship of a party does not oust the jurisdiction."

The comments in the *Red Cab* case illustrate the sound reasoning behind the rule set forth at page 289 therein that "events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction." Chief Justice Marshall in *Mollar v. Toran, 9 Wheat. 537, 539, 6 L. Ed. 154, 155*, said, "It is quite clear, that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events". So well established is this rule that even if the pleadings indicate a valid defense to the claim, federal jurisdiction is not defeated. *St. Paul v. Red Cab, at p. 289.* In fact, where the complaint as filed in the state court states an amount in controversy sufficient to confer jurisdiction upon the federal court and after removal to the federal court the complaint is dismissed, the Federal Court, nevertheless, retains jurisdiction of a counterclaim below the jurisdictional amount. *Kirby v. American Soda Fountain Co., 194 U. S. 141, 48 L. Ed. 911*, and cases cited therein.

The majority of the court in *Horton* founded its opinion squarely upon the *Red Cab* case and was certainly aware of the reasoning contained therein that federal jurisdiction should not be left to the capricious reduction of his claim by the plaintiff. It, therefore, seems inconceivable that the majority of the court in *Horton* could have intended to create a practice in workmen's compensation cases similar to that criticized in the *Red Cab* case as claimed by Petitioner. If federal jurisdiction is based on the counterclaim, then as a practical matter it can always be defeated by the defendant's reduction of his counterclaim; and the defendant can return to the state court and file suit, or amend his pleadings, and seek recovery for the full $14,035.

Undoubtedly, Petitioner's statements regarding "tentative federal jurisdiction" arise from the minority opinion of the court in *Horton*, stating:

> "It seems impossible to avoid the conclusion that the court is allowing diversity jurisdiction to be predicated upon a counterclaim which might possibly be filed by Petitioner." (Opinion p. 897 L. Ed.)

The error in this is that the insurer in that case did not sue only to be relieved from a possible counterclaim (although one was sure to be filed); rather, it sued to be relieved from a potential maximum liability of $14,035 which then existed *whether or not* a counterclaim was filed in that action. In the case at bar, no reference whatsoever was made to a counterclaim in Respondent's complaint, but Respondent alleged that the amount of the claim could be definitely determined and that the amount in controversy exceeded $10,000, exclusive of interest and costs. General allegations that the amount in

controversy exceeds the jurisdictional minimum have been held in many cases to be sufficient to affix jurisdiction. *Gibbs v. Buck, 307 U. S. 66, 83 L. Ed. 1111; Packard v. Banton, 264 U. S. 140, 142, 68 L. Ed. 596, 607; City of Memphis, Tenn. v. Ingram, 195 F. 2d 338.*

It is apparent that Respondent did not file suit merely to be relieved from a potential counterclaim. Respondent sued to be relieved of a maximum potential liability of $14,035, regardless of any counterclaimed amount. It seems clear that the majority opinion in *Horton* determined the amount in controversy in the same manner—based upon the maximum potential liability of the insurer, from which insurer sought to be relieved.

Countless cases have been decided by the federal courts in which a party sued to be relieved of an obligation or burden of some nature, e.g., a tax, regulation by statute, or potential liability under an insurance policy. These cases have uniformly held that the maximum potential liability to the party seeking relief fixes the amount in controversy. When statutory regulation is sought to be enjoined, jurisdiction is to be tested by the value of the right to be free from the interference of the statute. *Gibbs v. Buck*, supra; *Packard v. Banton*, supra; *City of Memphis, Tenn. v. Ingram*, supra.

When suit is brought by an insurance company in a federal court to rescind a policy, to declare its rights thereunder, or to enjoin a state court proceeding, the amount in controversy is the maximum potential liability of the company. *Ballard v. Mutual Life Ins. Co. of N. Y., 109 F. 2d 388; Mutual Benefit*

Health & Acc. Assoc. v. Fortenberry, 98 F. 2d 570; Hartford Acc. & Indem. Co. v. Northwest Nat. Bank, 228 F. 2d 391. In *N. Y. Life Ins. Co. v. Swift, 38 F. 2d 175, 176,* the court said:

> "In a suit to prevent a future loss or damage to the plaintiff, the object to be gained by the bill is the test of the jurisdictional amount; in other words, the value of the right to be protected."

Similarly, in *Commercial Cas. Co. v. Humphrey, 13 F. Supp. 174, 178,* a Texas district court stated that the test of jurisdiction was "the maximum amount for which plaintiff may be liable under the policy."

Regarding Texas workmen's compensation claims, it has been held by the Fifth Circuit that the amount in controversy "*is the largest amount that could be recovered under the claim*" (Emphasis added). *General Acc. Fire & Assur. Corp. v. Mostert, 131 F. 2d 596 (5 Cir. 1942).* The Supreme Court of the United States has said in a workmen's compensation case:

> "Nor does the fact that it cannot be known as a matter of absolute certainty that the amount which may ultimately be paid, if respondent prevails, will exceed $3,000, mean that the jurisdictional amount is lacking. This Court has rejected such a restrictive interpretation of the statute creating diversity jurisdiction."
>
> *Aetna Casualty & Surety Co. v. Flowers, 330 U. S. 464, 67 S. Ct. 798, 91 L. Ed. 1024, 1027.*

The merits of this simple method of determining the amount in controversy where relief is sought from an obligation or burden have been proved by years of continuous use and should not now be discarded in favor of a rule which

would place federal jurisdiction at the option of the defendant. To do so would generate uncertainty not only in workmen's compensation cases but also in cases wherein a complaint is filed seeking relief from some other type of obligation. The court in *Horton* did not base its opinion on what the defendant might do, or, in fact, did do, but based it upon the established principles set forth in the *Red Cab* and *Bell* cases. These principles should not now be abandoned.

Petitioner asserts that the upholding of federal jurisdiction in this case is contrary to the decision of this court in *McNutt v. General Motors Acceptance Corp. of Ind., 298 U. S. 178, 80 L. Ed. 1135.* The predicate for the alleged conflict is laid in Petitioner's STATEMENT to the effect that: "Although the Petitioner—employee challenged the jurisdiction of the federal court and denied that the amount in controversy exceeded $10,000 exclusive of interest and costs, trial proceeded in federal court * * *." Petitioner then asserts at page 7 of his Petition that "The Respondent insurer's form book allegation that the amount in controversy exceeded $10,000 was denied by the Petitioner. There is not one shred of evidence in the entire record to support the Respondent's allegation. The upholding of jurisdiction is in direct conflict with McNutt v. General Motors Acceptance Corporation, 298 U. S. 178, 190."

To set the record straight, Petitioner did file a motion and pleading seeking a dismissal of Respondent's suit for want of jurisdiction; however, he then *expressly waived* his objections to the jurisdiction in order that he could proceed to trial (Judgment, App. A, pp. 1a-3a, Petitioner's Petition for Writ

of Certiorari).[2] This waiver immediately distinguishes the *McNutt* case. There, the plaintiff sought an injunction to prevent the enforcement of a state statute regulating "finance charges" made upon the purchase of installment sales contracts. The defendant *denied* that the necessary jurisdictional amount was in controversy and the plaintiff's only evidence was the net worth of his business in Indiana—not the loss he would suffer under the statute. The court said:

> "The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. *The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed.* The particular allegations of respondent's bill as to the extent or value of its business *throw no light upon that subject.* They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegations as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. *That allegation was put in issue* and the record discloses neither finding nor evidence to sustain it." (Emphasis added.)

As the record in this case plainly shows, Petitioner not only waived any challenge of the allegations in the Complaint as to jurisdiction, but he also withdrew any objections after the trial. He now desires to go into these matters for the first time before the Supreme Court of the United States.

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[2]Petitioner was unable to obtain a trial setting in the state court as rapidly as in the federal court.

Even though Petitioner did not call upon Respondent to produce it, there is evidence in the record upholding juristion. Respondent's complaint clearly shows the nature of the claim which Petitioner presented to the Industrial Accident Board. Such a claim, under the Texas cases, can be given a monetary value of $14,035 because it will support a judgment for that amount. At the time Respondent filed its suit, there was not one shred of evidence that Petitioner would claim anything less. Actually Petitioner is again attempting to direct the Court's attention to the counterclaim and away from the complaint and the good faith allegations therein. He bases his argument that there is no evidence to support the complaint on the fact that he later chose to assert less than $10,000 in his counterclaim. This is not the test set forth in *Red Cab, Bell & Horton.* Federal jurisdiction is to be based on the allegations in the complaint and Petitioner must challenge and disprove the good faith thereof.

The procedure Petitioner should have followed to challenge the allegations in the complaint is set out in *Fireman's Fund Ins. Co. v. Railway Express Agency, 253 F. 2d 780, 784:*

> "Such a rule (that a valid defense in diminution of the amount claimed does not necessarily diminish the amount that is or may be claimed in good faith by the Plaintiff), does not contravene another well settled rule that the court has the power to determine in every case whether the prerequisites to jurisdiction in fact exist and such jurisdictional issues are properly triable to the court prior to a trial on the merits. Rule 12(b) and (d), Rules of Civil Procedure, 28 U.S.C.A. The manner in which such a determination should be made is left to the trial court. *Gibbs v. Buck,* 307 U. S. 66, 76, 59 S. Ct. 725, 83 L. Ed. 1111. The court may inquire by

> affidavits or otherwise into the facts as they exist. It is not, however, a hearing upon the merits. *Land v. Dollar*, 330 U. S. 731, 735, note 4, 67 S. Ct. 1009, 91 L. Ed. 1209."

It must be shown to a legal certainty that the allegations were not made in good faith. *Horton v. Liberty Mut. Ins. Co.*, supra. The Respondent is well aware of the fact that the lack of jurisdiction cannot be waived by any one or both of the parties, but an inquiry into the matter of good faith is a question of fact which is for the trial court, like other questions of fact.[5] The issue on an appeal involving the determination of a jurisdictional fact is whether or not there is sufficient evidence to uphold the trial court's judgment on that point. *Digby v. U.S.F. & G. Co. (5th Cir. 1957), 239 F. 2d 569, 572.* The court there said in such a case at page 572:

> "It being our function not to retry this issue on the facts, but only to determine whether the court's holding was clearly erroneous, we must affirm judgment of the trial court."

There is not a scintilla of evidence in the record to detract from Respondent's good faith. Respondent knew that its maximum potential liability was $14,035, and the cases are legion that this is the correct basis for determining federal jurisdiction when a complainant seeks relief from an obligation or burden. What Petitioner elected to place in his counterclaim should not be substituted as the basis for determining the good faith of the allegations contained in the complaint.

[5]The trial judge is able to receive testimony, such as correspondence which may have taken place between the parties, and is able to examine various kinds of evidence, e.g., medical testimony. He is also familiar with the local law and the practices thereunder and is thus better able to determine a jurisdictional fact than any other court.

A fortiori, the Petitioner should not be allowed to circumvent the trial court and try the issue of good faith for the first time in an appellate court—in this instance, the United States Supreme Court. The upholding of jurisdiction in this suit does not conflict with *McNutt* or the other cases establishing the rules for determining jurisdiction; but, in fact, such action is in complete accord with *Red Cab*, *Bell* and *Horton*.

At page 9 of the Petition for Writ of Certiorari, Petitioner argues that the federal abstention doctrine as set forth in *Meredith v. City of Winter Haven, 320 U. S. 228*, should be applied to this case. After demanding and receiving a jury trial in the Federal District Court and not being satisfied with the judgment obtained, Petitioner now seeks federal court abstention. The doctrine of abstention as enunciated in Meredith, page 235, is an appeal to the discretionary powers of the court, the exercise of which relates to "* * * the equitable jurisdiction conferred on federal district courts * * *." Petitioner's position can have no appeal to a court of equity. Furthermore, as an equitable doctrine, it is not appropriate in the case of a statutory proceeding such as a workmen's compensation case and as far as is known, has never been applied to a workmen's compensation case. Congress, after full consideration, has not seen fit to deny federal jurisdiction in workmen's compensation cases, as properly held in Horton.

CONCLUSION

The Petition for a Writ of Certiorari should be denied because: (a) the appeal to the Court of Appeals was not properly perfected, (b) the Petition is untimely in that there are procedural questions raised by the record which properly should first be considered by the Court of Appeals, and (c) there are good faith allegations in the complaint, and an untraversed showing that at the time the complaint was filed more than $10,000, exclusive of interest and costs, was the amount in controversy. The decision in Horton is correct, it is controlling in the case at bar, and should be left undisturbed.

Respectfully submitted,

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By .....

Attorneys for Respondent.

This is to certify that a true copy of the foregoing brief has been served upon Petitioner's counsel, William VanDercreek, 3315 Daniels, Dallas 5, Texas, and Jack Gay and Marvin Jones, Jones, Phillips & Watkins, 1714 Life Building, Dallas, Texas, by depositing the same in the United States mail with first-class postage properly addressed.

Reo Knowles

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APPENDIX A

Motion for New Trial Filed by Petitioner in the United States District Court for the Northern District of Texas on June 23, 1961

(Heading Omitted)

MOTION FOR NEW TRIAL

To the Honorable Judge of Said Court:

Now comes defendant and cross-plaintiff, Horace Hart, and files this, his motion for new trial, and moves the court to set aside the judgment heretofore entered in the above entitled and numbered cause, and would show to the court:

1.

The verdict and judgment are contrary to the evidence, in that the evidence showed the cross-plaintiff either has permanent disability or has none; that by the verdict of the jury and in accordance with the judgment of the court the defendant had partial disability which expired at the end of 79 weeks; that there was not even a scintilla of evidence to support temporary partial disability.

2.

That the court erred in submitting cross-defendant's Special Requested Charge No. One over cross-plaintiff's objection, for the reason that it conflicted with the charge already prepared and submitted by the court, and further it advised the jury of the effect of their answer, all of which is evidenced

by a certain note submitted to the court by the foreman of the jury in which he inquired as to the reason for being required to answer the said special charge and what effect the answer would have on any award given cross-plaintiff.

3.

That the court was without jurisdiction of this cause for the reason that the amount in controversy was less than $10,000.00 as required by Title 28, Section 1332, United States Code Annotated as amended by Public Law 85-554, July 25, 1958.

4.

The court erred in overruling cross-plaintiff's objection to the submission of cross-defendant's requested definition of partial disability for the reason that said definition is contrary to the law, in that in arriving at the amount of disability the jury may consider the fact that cross-plaintiff could procure and retain employment of a type for which he has no skill or training; further, that he may be able to perform labor of a less remunerative class; that said definition does not reflect the true measure of loss of earning capacity as required by Texas Revised Statutes, Article 8306, Section 11.

5.

That the court erred in explaining to the jury the method by which the amount of a workmen's compensation award is determined.

6.

That the court erred in allowing the motion pictures to be shown to the jury over cross-plaintiff's objection, for the reason that said pictures did not show the cross-plaintiff doing anything contrary to the evidence in the case; that said motion pictures did not show cross-plaintiff performing the duties of his employment or any of the usual tasks of a workman; that the cross-plaintiff was surprised by the use of said motion pictures; that he had not been apprised that motion pictures would be used; that allowing cross-plaintiff to view said motion pictures at approximately 4:00 P.M. and showing them to the jury at approximately 10:00 A.M. the next day did not allow cross-plaintiff sufficient time to prepare a defense.

7.

The court erred in failing to submit to the jury an instruction as a part of the court's charge that the cross-plaintiff, Horace Hart, could be disabled as defined by the Workmen's Compensation law even though, by reason of economic necessity he had worked as an employee during such period of disability.

8.

That the jury failed and refused to consider all of the charge given to them by the court, in that the foreman refused to take all of the court's charge into the jury room for consideration of the jury, and the charge not taken was an instruction that the cross-plaintiff, Horace Hart, could be disabled as defined by the Workmen's Compensation law,

even though, by reason of economic necessity, he had worked as an employee during such period of disability.

9.

That in awarding 11 weeks of total disability and 68 weeks of partial disability, the jury did not determine such disability based upon the evidence in the case but based upon speculation of the jury not supported by any evidence; that the cross-plaintiff, Horace Hart, could not draw any payment for disability if he was employed during such period of disability; further, that if cross-plaintiff was awarded permanent disability as shown by the evidence he would be discharged by the cross-defendant and that it was more beneficial for the cross-plaintiff, in view of his 33⅓% disability, to continue his employment for the cross-defendant than to receive the compensation which the evidence indicated he was entitled to receive.

WHEREFORE, defendant and cross-plaintiff Horace Hart prays that this motion for new trial be granted, and that the defendant and cross-plaintiff be granted a new trial herein, that the judgment of the court heretofore received herein be set aside and held for nought, and that this defendant and cross-plaintiff be awarded a new trial.

JONES, PHILLIPS, BARNES & WATKINS,

By
JACK GAY, of Counsel,
1714 Life Bldg.,
Dallas, Texas RI 7-6262

(filed June 23, 1961)

APPENDIX B

Petitioner's Application to the Trial Court to Withdraw His Motion for New Trial Filed July 15, 1961

(Heading Omitted)

APPLICATION

To the Honorable Judge of Said Court:

Now comes Horace Hart, defendant and cross-plaintiff in the above entitled and numbered cause, and files this his application to withdraw his motion for new trial heretofore filed herein.

WHEREFORE, premises considered, defendant and cross-plaintiff prays that the court order his motion for new trial withdrawn.

JONES, PHILLIPS, BARNES & WATKINS,

By
JACK GAY, of Counsel,
1714 Life Bldg.,
Dallas, Texas RI 7-6262

(filed July 14, 1961)

APPENDIX C

Petitioner's First Notice of Appeal Filed in the Trial Court on July 14, 1961

(Heading Omitted)

NOTICE OF APPEAL

To the Honorable Judge of Said Court:

Notice is hereby given that Horace Hart, defendant above named, hereby appeals to the United States Court of Civil Appeals for the Fifth Circuit from the final judgment entered in this action on June 16, 1961.

Dated July 14, 1961.

JONES, PHILLIPS, BARNES & WATKINS,

By
JACK GAY, of Counsel,
1714 Life Bldg.,
Dallas, Texas RI 7-6262

(filed July 14, 1961)

APPENDIX D

Order of the Trial Court Granting Petitioner's Motion to Withdraw Petitioner's Motion for New Trial and Ordering Withdrawal Thereof, Entered 19th Day of July, 1961

(Heading Omitted)

ORDER

On this day came on to be heard the motion of defendant and cross-plaintiff to withdraw his motion for new trial, and it appearing to the court that said motion should be granted;

IT IS HEREBY ORDERED that defendant's and cross-plaintiff's motion for new trial be and the same is hereby withdrawn for all purposes.

ENTERED this 19 day of July, 1961.

/s/ T. WHITFIELD DAVIDSON

JUDGE

APPENDIX E

Petitioner's Second Notice of Appeal Filed July 24, 1961

(Heading Omitted)

NOTICE OF APPEAL

Notice is hereby given that Horace Hart, defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on June 16, 1961. The Defendant filed a timely motion for new trial on June 23, 1961. The motion for new trial was withdrawn by the Defendant on July 14, 1961, and a notice of appeal then filed. On July 21, 1961, the District Court entered an order approving the withdrawal of the motion for new trial.

Dated July 24, 1961.

JONES, PHILLIPS, BARNES & WATKINS,

By
JACK GAY,
Attorney for Defendant-Appellant,
1714 Life Bldg.,
Dallas, Texas RI 7-6262

(filed July 24, 1961)

APPENDIX F

Article 8306, Sec. 10, of Vernon's Texas Civil Statutes (Texas Workmen's Compensation Law)

TOTAL INCAPACITY

"Sec. 10. While the incapacity for work resulting from the injury is total, the association shall pay the insured employee a weekly compensation equal to sixty per cent (60%) of his average weekly wages, but not more than Thirty-Five Dollars ($35) nor less than Nine Dollars ($9) and in no case shall the period covered by such compensation be greater than four hundred and one (401) weeks from the date of the injury (Acts 1957, effective September 1, 1957)."

APPENDIX G

Certificate of Reo Knowles as to Workmen's Compensation Cases Filed in United States District Court, Northern Districe of Texas, Dallas Division, from July 25, 1958, to August 31, 1961

This is to certify that the docket sheets for cases filed in the United States District Court for the Northern District of Texas, Dallas Division, during the period July 25, 1958, to August 31, 1961, were personally checked by counsel for Respondent and that only eleven (11) Workmen's Compensation Cases were found to have been filed in such Division of said Court by insurance companies during said period and that only eleven (11) such cases were filed by employees in such Division of said Court during this time.

/s/ REO KNOWLES

Reo Knowles